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In The
SUPREME COURT OF THE UNITED STATES
October Term 1966

No. 505

IN THE MATTER OF APPORTIONMENT OF THE MICHIGAN LEGISLATURE

MAXWELL F. BADGLEY, et al.,
Appellants,

v.

SECRETARY OF STATE JAMES M. HARE, and AUGUST SCHOLLE, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the above entitled case be dismissed or affirmed on grounds that no substantial federal question is presented.

Statement

This is a direct appeal from the final order of the Supreme Court of Michigan entered on April 6, 1966 dismissing appellants' petition made pursuant to Article IV, Sec. 6, paragraph 8 of the Michigan Constitution of 1963 for review of the apportionment and districting plan for the Michigan legislature. 377 Mich. 396

On January 1, 1964 the Michigan Constitution of 1963 became effective. Article IV, Sec. 6 of said Constitution establishes a bipartisan Commission on legislative apportionment consisting of eight members (four from each of the two major political parties) to district and apportion the state senate and house of representatives according to the provisions of the Constitution. Paragraph 7 of Sec. 6 provides that in case a majority of the Commission members cannot agree upon a plan, each member individually or jointly with other members may submit proposed plans to the State Supreme Court which will determine which plan complies most accurately with constitutional requirements and will direct adoption of that plan by the Commission.

It is further provided by paragraph 8 of Sec. 6 that after the adoption of a final plan by the Commission any elector may make application to the Court to review any final plan adopted by the Commission and, if necessary, to remand such plan to the Commission for further action.

During January of 1964 the Michigan Apportionment Commission met frequently but was unable to agree upon a plan of apportionment. Thereafter, in accordance with Article IV, Sec. 6, paragraph 7, a number of plans were submitted by members of the Commission to the State

Supreme Court for consideration. Among the plans submitted were the so-called "Hannah-Brucker Plan" and the "Austin-Kleiner Plan."

In March of 1964 decision was rendered in a suit previously filed in the United States District Court for the Eastern District of Michigan wherein plaintiffs alleged the Michigan constitutional provisions concerning apportionment of the state legislature to be violative of the Fourteenth Amendment of the United States Constitution. The District Court held that Michigan constitutional provisions relating to apportionment of the legislature resulting in substantial departure from the principle of equal representation in the state senate and slight departure in the state house by permitting increase in the representation of persons in sparsely populated areas was not invalid under the Fourteenth Amendment. *Marshall v. Hare,* 227 F Supp 989 (1964). Subsequently on May 26, 1964 the Michigan Supreme Court concluded that the Hannah-Brucker Plan should be adopted and on May 28, 1964 said plan was adopted by the Michigan Apportionment Commission and published by the Michigan Secretary of State.

On June 15, 1964 this Court then decided *Reynolds v. Sims,* 377 U.S. 533, in which the Court held that as a basic federal constitutional requirement, the equal protection clause requires that seats in the both houses of a bicameral state legislature must be apportioned as nearly as practicable upon a population basis.[1]

---

[1] On June 22, 1964 this Court reversed the judgment of the District Court in *Marshall v. Hare,* supra, and remanded the case for further proceedings consistent with the view stated by the Supreme Court in *Reynolds v. Sims* and other cases relating to state legislative apportionment decided along with *Reynolds,* 378 US 561 (1964). The District Court has since deferred further action pending the outcome of this case.

Two days later, on June 17, 1964, the Michigan Supreme Court entered orders vacating its previous order directing adoption of the Hannah-Brucker Plan and directed the Apportionment Commission to proceed to adopt a plan in accordance with the constitutional requirements and guide lines provided by the U.S. Supreme Court in *Reynolds v. Sims,* supra. Thereafter, the Apportionment Commission, again being unable to agree upon a plan, once more submitted various plans to the State Supreme Court for its consideration.

On June 22, 1964 the State Supreme Court in *In re Apportionment of Legislature,* 373 Mich 250 (appellants' Jurisdictional Statement — Appendix C) ruled that there can be no question as to the overriding requirement that districts in both houses of the legislature must be as nearly equal in population as practicable and that the Austin-Kleiner Plan filed with the Court most nearly complied with that requirement. The Court, therefore, ordered the Legislative Apportionment Commission to adopt the Austin-Kleiner Plan, said plan to be published by the Michigan Secretary of State and to be effective for the 1964 election. The 1964 general election for seats in both houses of the Michigan legislature was based on the districts constructed in the Austin-Kleiner Plan and are still extant.

On August 21, 1964 the present action was commenced by the filing of a petition in the Michigan Supreme Court pursuant to Article IV, Sec. 6, paragraph 8. In their petition the appellants requested that the State Supreme Court review the Austin-Kleiner Plan, provide for discovery and the taking of evidence, declare the Austin-Kleiner Plan void, and order the State Apportionment Commission to prepare a new plan.

On January 14, 1965 the Michigan Supreme Court denied

petitioners' motion for discovery. On February 5, 1965, a motion for reconsideration having been filed by the appellants, the Court entered an order scheduling the cause for oral argument on May 11, 1965 and amended its order of January 14, 1965 to provide that whether and to what extent appellants' request for discovery should be granted was to be briefed and would be decided after oral argument. Oral argument was presented on May 11, 1965 and on November 2, 1965 the Court in *In re Apportionment of Legislature,* 376 Mich 410 (appellants' Jurisdiction Statement — Appendix A) without ruling on matter of discovery and the taking of evidence, remanded the matter of legislative apportionment back to the State Commission to proceed anew with such work as would enable the Commission to apportion the state legislature according to the applicable requirements of the Federal and State Constitutions. The order of the Court stated that in the event of another deadlock continuing for a 60 day period, the Secretary of the Commission was to so report to the Court with petition for entry of such further mandatory order as the Court might choose to enter pursuant to its broad powers of mandamus.

On January 4, 1966 the Michigan Secretary of State, acting as Secretary of the Apportionment Commission, reported that the Commission was once again deadlocked. Subsequently the four Republican commissioners filed a statement with the Court praying that the Court direct adoption of their "Senate and House Plan No. 5," or in the alternative, order further hearing, reference, or other relief. Senate and House Plan No. 5 as submitted to the Court by the Republican commissioners advocated an apportionment formula based upon a predetermined ratio of a 5% maximum variation between the smallest and the largest districts. The plan substantially reduced the number of county lines crossed, while substantially increasing the

population disparities between districts as compared with the existent Austin-Kleiner Plan.

Shortly after the filing of the Republican statement urging adoption of their "Senate and House Plan No. 5" a reply by the Democratic commissioners and brief by the intervening defendant Scholle, et al., was filed with the Court wherein the 5% plan offered by the Republican commissioners was insisted to be an unconstitutional mechanical approach to apportionment citing *Roman v. Sincock,* 377 U.S. 695, 84 S Ct 1449, 12 L ed 2d 620, and that population disparities were excessive. About the same time, a Democratic version of the so-called 5% plan was also offered to the Court.

On January 12, 1966 the Michigan Supreme Court met in special conference and by majority vote denied petitioners' request for discovery and also ordered up all of the proceedings and records of the Commission on legislative apportionment. During the ensuing six weeks the parties then filed with the Court numerous statements, supplemental statements, amended statements, briefs, answers and petitions. See *In re Apportionment of State Legislature,* 377 Mich 396, 464-469 (appellants' Jurisdictional Statement—Appendix B).

Finally, on April 6, 1966, the Michigan Supreme Court reaffirmed its earlier decision that of the various apportionment plans submitted to the Court for its consideration the previously adopted and existing Austin-Kleiner Plan more nearly met the requirements of the Federal and State Constitutions. The Court, therefore, ordered that the Austin-Kleiner Plan be followed in the 1966 election and thereafter until the next decennial reapportionment or as otherwise may be required by constitutional amendment.

ARGUMENT

I

The Michigan Legislative Apportionment Plan does not violate the equal protection clause of the Fourteenth Amendment.

The main thrust of Appellants' claim, both in this Court and in the Michigan Supreme Court, is that districts established pursuant to the Michigan plan of apportionment (although nearly as equal in population as practicable) are designed to maximize the legislative representation of one major party and minimize those of the other major party. Appellants assert that the districts are of unnatural shape, cross political subdivision boundary lines, and as a result the Michigan Plan is one of invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment.

Pursuant to Article IV, Section 6 of the Michigan Constitution of 1963, the Michigan Supreme Court is charged with the responsibility (in cases where the state apportionment commission cannot agree upon a plan) of considering various plans of apportionment which may be submitted to it by individual members of the commission, to order adoption of the plan which in the opinion of the Court most nearly complies with constitutional requirements and, if requested by a petition filed by electors, to review any final plan adopted by the state commission.

In proceedngs before the State Court resulting in its decisions reported at 373 Mich 250 and 377 Mich 396, the Court has clearly ruled that of those plans submitted, the present plan of state apportionment most accurately com-

plies with Federal and State constitutional requirements and no claim is made by appellants in the case at bar that the principle of equal population in state legislative apportionment as construed by this Court in *Reynolds v. Sims* has not been fully implemented by the existing plan. Rather, Appellants attack the present Michigan plan of apportionment on grounds that state standards have been submerged in the "one-man one vote" principle and that the plan is the product of partisan political gerrymandering.

A state may prescribe standards of apportionment designed to prohibit or inhibit gerrymandering. *Reynolds v. Sims,* 377 U.S. 533, 578. However, in considering state legislative apportionment plans which seek to recognize existing political unit boundary lines, etc., this Court has clearly stated in *Reynolds* as follows:

> "But if, even as a result of a clearly *rational* state policy of according some legislative representation to political subdivisions, the population is submerged as the controlling consideration in the apportionment seats in the particular legislative body, then the right of all the State's citizens to cast an effective, and adequately weighted vote would be unconstitutionally impaired." (Emphasis added)

While some members of the Michigan Supreme Court have expressed doubt whether state standards relating to compactness and the following of natural and political boundary lines contained in Article IV of the Michigan Constitution survive this Court's decision in *Marshall v. Hare,* 378 U.S. 561 (reversing the decision of the Federal District Court upholding Michigan's constitutional standards relating to apportionment resulting in substantial departure from the principle of equal population of state legislative districts), nevertheless, it is clear from the State

Court's Opinions that of all of the plans submitted to the Court, the existing plan is most in keeping with the overriding requirement of population equivalency and does form compact and contiguous districts, etc., as nearly as practicable. Moreover, Appellants' purely conclusory allegations of gerrymandering put forth in the lower court based solely upon suspicion and speculation and supported only by reference to prior election results, did not compel the Court's grant of discovery and the taking of testimony. As stated at 377 Mich 447, Appellants submitted no offer of proof of facts within their power to establish, as distinguished from facts which they hoped to discover. In other words, no fishing expedition was sanctioned by the Michigan Supreme Court.

In the State Court Appellants claimed the superior merits of the so-called "5% plan," a plan based upon a mathematical formula providing in its application for a variation in population among the districts of as much as 8%. Population disparities of the 5% plan ranged up to 16,590 in the Michigan Senate and 5,620 in the House. Thus the plan supported by Appellants was considerably greater in disparity of population than the 2,027 in the Senate and 3,082 in the House, as contained in the existing Michigan plan of apportionment.

In supporting the 5% plan, Appellants also ignore this Court's decision in *Roman v. Sincock,* 377 U.S. 695, 710 which deplores any mathematical standard. In *Roman* this Court has unequivocally disavowed state legislative apportionment involving mathematical standards stating that:

> "In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a State

> legislative apportionment scheme under the equal protection clause. Rather, the proper judicial approach is to ascertain whether under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."

Appellants, in claiming invidious discrimination based upon the establishment of legislative districts of unnatural shape which cross natural or political unit boundary lines, assert the merits of the 5% plan by showing that under the plan only 3 of 83 county lines were breached in the Senate (compared to 18 in the present plan) and only 11 county lines were breached in the House. (compared to 32 in the present plan). In urging the State Court to disturb the present plan and to order adoption of the "5% plan" appellants overlook the fact that the latter plan also clearly established oddly shaped and distorted districts, and that (as stated at 377 Mich 473) the plan could claim no virtue with respect to partisan gerrymandering.

Appellee does not here claim, nor has the Michigan Supreme Court held, that the present plan is perfect or that it could not be improved or altered and still meet Federal constitutional requirements. However, there is obviously no merit in the call of Appellant's to throw out the existing law merely because it is their conclusion that some districts are not as compact or square in shape as possible, or that some districts do not follow city or township boundary lines as closely as might be possible. The Michigan Supreme Court performed its constitutional duty of selecting, from the apportionment plans before the Court, the plan which

in the Court's opinion most nearly complied with Federal and State requirements.

> " • • • It follows, also that it cannot be said that the legislature wholly failed to have in view and apply the principle of compactness of territory. No district, unless a circle or a square, could be so compact that it could not be made more so. • • •" *Woodyatt v. Thompson*, 155 Ill. 451, 40 N.E. 307, 316.

It is additionally apparent that to give credence to any charge of "unlawful" political gerrymandering, one must assume the immutability of voting habits in a given area. The record in Michigan shows the fallacy of any such assumption, the most recent case in point being the presidential and gubernatorial elections of 1964. As stated in *Honeywood v. Rockefeller*, 214 F. Supp 897:

> "The incalculable and imponderable factors that make up an individual's choice as to how he will register his vote make certainty here an illusive object. We would require far more substantial evidence to warrant our intrusion into the political arena and to justify any action by the Court requiring the Legislature to revise these districts again."

This Court's decision in *Fortson v. Dorsey*, 379 U.S. 433, cited by Appellants in support of their political gerrymandering claim, was exclusively addressed to the question of multi-member legislative districts and the possibility of such districts cancelling out the voting strength of political or racial elements. The Michigan plan contains no multi-member districts.

The Appellee respectfully submits that the establishment of state legislative districts of as nearly equal popula-

tion as practicable necessarily results in the crossing of county, city and township boundary lines and in the unnatural shape of districts. However, this does not support the speculation and conclusory allegations put forth by Appellees that such districts are the product of partisan political gerrymandering. Nor does such a claim present a substantial Federal question under the equal protection clause of the Fourteenth Amendment.

II

The Michigan Supreme Court did not err in using equality of population as the prime and overriding criteria in determining which of the districting plans submitted for its consideration most nearly complied with State and Federal constitutional requirements.

Appellants assert that the action of the Michigan Supreme Court in ordering adoption of the present Michigan Apportionment plan (Austin-Kleiner plan), and the Court's subsequent refusal to disturb the plan after hearing on Appellants' petition to review is in clear conflict with such cases as *Yancey v. Faubus,* 251 F. Supp 998 (E.D. Ark. 1965), affirmed per curium, 383 U.S. 271 (1966); *Engle v. Kerner,* 33 Ill. 2d 11, 210 NE 2d 165 (1965), appeal dismissed per curium. 384 U.S. 30 (1966); *Stout v. Bottorff,* 248 F. Supp 488 (S.D. Ind. 1965), and *Sims v. Boggett,* 247 F. Supp 96 (M.D. Ala. 1965).

The foregoing cases and others cited by Appellants stand for the proposition that state legislative apportionment must give primary consideration to population and consideration to other factors such as geography, political subdivisions and the like is subservient to the population factor, that mathematical nicety is not constitutionally required in

reapportionment schemes, and that there may only be minor deviations from the population norm as necessary. The utilization of state standards in legislative apportionment may not, however, reach the point where their application brings unavoidable conflict with the United States Constitution.

Unlike the plans involved in the foregoing cases, the apportionment plan approved by the Michigan Supreme Court establishes districts of substantially equal population, and in the instant appeal Appellants in effect call for nullification of the state apportionment law by this Court on grounds that the Michigan plan goes too far in curing the unconstitutional conditions which this Court dealt with in *Reynolds v. Sims,* supra. Appellants, in so arguing, further maintain that in approving the existing apportionment plan the State Court has failed to observe alleged valid state constitutional standards by giving too limited consideration to relevant factors such as geography and political subdivisions.

A reading of the most recent apportionment decision of the Michigan Supreme Court does not however sustain such claims. At 377 Mich 450, Mr. Justice Souris speaking of population equality in districting and attendant state standards wrote as follows:

> "The thrust of the challenge against the alternate Austin-Kleiner plan is that it accomplishes greater equality than the Federal Constitution's equality clause requires at the expense of surviving State standards. It is not possible to claim, and nobody does, that the requirements of equality of population and all of the Stat standards claimed to survive can be met. If equali is approached, some boundary lines must be brea ed and some districts must be

irregularly shaped. The alternate Austin-Kleiner plan approaches absolute population equality, perhaps more so than any other reapportionment plan in the United States, to date. Necessarily, some boundary lines were breached, 18 out of the State's 83 counties' lines in the Senate and 32 in the House. However, preeminence of the Federal equality clause requirements, in our scheme of legal values, precludes any finding by this Court of constitutional infirmity in the alternate Austin-Kleiner plan on the ground that it renders equality too equally at the expense of subordinate State standards."

At 377 Mich 453, 454, Mr. Justice Adams, addressing himself to the same matter, stated:

"The recent 60-day remand to the apportionment commission demonstrates that it is possible to come up with numerous plans, all of which apparently have some merit. Because of the nature of Federal constitutional standards, however, there is never full conformity with State standards.

Consequently, once a plan has been finally adopted, as the alternate Austin-Kleiner plan has been, for its validity to be successfully attacked there must be pleaded substantial departure from State standards. That has not been done here."

Appellee submits that it is readily apparent that the Michigan Supreme Court has carefully considered alleged state constitutional standards and it is equally evident that the highest Court of this state has decisively ruled that the Michigan Apportionment plan does not violate state standards.

Appellees respectfully submit that the Michigan Apportionment plan is on its face obviously in compliance with Federal constitutional requirements and guidelines as promulgated by this Court in *Reynolds v. Sims.* Moreover, the decision of the Michigan Supreme Court relating to application of alleged state constitutional standards should be conclusive and assertion by Appellants that alleged state standards have not been adequately applied in a state apportionment plan does not raise a substantial federal question.

III

Appellants were not denied due process of law by virtue of the Michigan Supreme Court's denial of their request for discovery and taking of testimony or by the division of the Court in its opinion validating the present Michigan Apportionment plan.

The appellants assign as error the refusal of the Michigan Supreme Court to grant their request seeking discovery and the introduction of testimony of past election results in the Supreme Court to attack the constitutionality of the existing Michigan Apportionment Law. It is claimed that the opportunity for a free hearing was thus denied and appellants cite *Iowa Central Railroad Co. v. State of Iowa,* 160 U.S. 389 (1896), *Hooley v. United States,* 209 F. 2d 219 (1st Cir.) 1954, Cert. den. 347 U.S. 953 (1954), *Honeywood v. Rockefeller,* 214 F. Supp 897 (E.D. N.Y. 1963) and other cases.

In *Iowa Central Railroad Co.*, supra, the Court held that the 14th Amendment in no way undertakes to control the power of the state to determine by what process legal rights

may be asserted, providing the method of procedure allows a free opportunity to be heard. This Court further indicated that whether a Court of last resort of a state has properly construed its own constitution and laws in determining what process of law may be applicable to a matter to be adjudicated by it is purely a question of state law binding upon the United States Supreme Court.

In *Hooley v. United States*, supra, the circumstances involved a criminal defendant accused of contempt in a grand jury proceeding. The Court held that a criminal defendant is entitled to be heard and introduce evidence and is not liable to judgment based solely upon the transcript of a grand jury examination. Appellee submits that the circumstances attendant in the foregoing criminal case have little bearing upon the facts involved in this appeal and should not be considered binding or applicable here.

In *Honeywood v. Rockefeller*, supra, plaintiffs were directly attacking the constitutionality of a state statute and alleging racial considerations to be a motivating factor in the redistricting of a congressional district. The Court held that proofs should have been submitted by the plaintiffs to substantiate their claims. The foregoing case is distinguishable from the instant appeal. The Michigan Supreme Court in considering the various apportionment plans submitted to it and in reviewing the final plan adopted by the Apportionment Commission was not functioning within the usual framework of adversary proceedings. As stated in the State Court's most recent opinion at 377 Mich 451:

> "this proceeding involves only our review of the alternate Austin-Kleiner plan in the face of allegations that it fails to comply with constitutional requirements * * *."

Beginning in 1964 and at intervals over the ensuing two years culminating in its recent decision in *In re Apportionment of Legislature,* 377 Mich 396, the State Court thoroughly and at great length considered the merits of various apportionment plans. During this period briefs and oral argument going to the merits of the various plans was afforded to all parties, together with numerous statements, amended statements, supplemental statements and other pleadings filed with the Michigan Court. Appellants' contention that they were not afforded a fair opportunity to be heard is thus not supported by the record of proceedings before the Court. The position of the Michigan Supreme Court is conclusively stated at 377 Mich 454, where the following appears:

> "Petitioners have failed to demonstrate that discovery would be appropriate to this case. All of the proceedings of the apportionment commission are open, public records. The official figures of the United States census, election precincts, political and geographic boundaries, are matters of which this Court takes judicial notice. The motivations, cogitations and machinations of the commissioners, even if discoverable, would not be relevant. Only the plan is subject to review."

The Michigan Supreme Court's denial of Appellants' request for discovery and the taking of testimony was moreover in keeping with earlier decisions of the Court relating to the application of Michigan Court Rules to discovery procedures, depositions, the introduction of testimony, etc. *Banaskiewicz v. Baun,* 359 Mich 109; *Insealator, Inc. v. Wallace,* 357 Mich 233; *Schechet v. Kesten,* 372 Mich 346, and *Board of Education of Presque Isle Township v. Presque Isle County Board of Education,* 364 Mich 605.

Finally, the Appellee submits that this Court has in many cases recognized that as a general rule matters affecting the remedy are governed by the law of the forum, and a decision by a State Court on a matter of state pleading or practice is therefore not reviewable by the United States Supreme Court. *Central Vermont R. v. White,* 35 S. Ct. 865, 238 U.S. 507; *Milkwagon Drivers' Union* vs. *Meadowmore Dairys Incorporated,* 61 S. Ct. 552, 312 U.S. 287; *McDonald v. Oregon,* 34 S. Ct. 772, 233 U.S. 655; *Los Angeles Farming etc. Co. v. Los Angeles California,* 30 S. Ct. 452, 217 U.S. 217 and *West v. Louisiana,* 24 S. Ct. 650, 194 U.S. 258.

The present state apportionment plan was adopted pursuant to the Michigan Supreme Court's decision *In re Apportionment of Legislature,* 373 Mich 250, wherein five Justices signed the Court Order directing adoption of the plan. Appellants now raise objection to the fact that the Court's Order of April 6, 1966 ordering dismissal of Appellants' petition to review the existing plan was signed by only four of the Court's eight Justices. The fact that Appellants' petition for review was denied by virtue of the foregoing division of the Court does not in Appellee's view establish denial of due process of law, nor does such division raise any substantial federal question requiring or deserving this Court's consideration. Rather, the simple and unassailable fact is that Appellants failed to convince a majority of the Michigan Court that their complaint was well-founded.

CONCLUSION

The Appellee respectfully submits that this appeal does not raise any serious or substantial question under the Equal

Protection and Due Process Clauses of the Fourteenth Amendment.

The Michigan Supreme Court has faithfully exercised the functions entrusted to it under Article IV, Section 6 of the Michigan Constitution of 1963, viz., the selection of a legislative apportionment plan which most nearly complies with permissible state standards and Federal requirements as exemplified in *Reynolds*.

After much effort the State of Michigan has at last achieved a plan of legislative apportionment which complies beyond doubt with the requirements of the Constitution of the United States as well as state standards where same may be applied. Legislative representation of all *people* in Michigan is now a fact.

Wherefore, Appellee prays that the entitled cause of action be dismissed or affirmed.

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Dated: September 27, 1966